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IN THE

Supreme Court of the United States

October Term, 1964

No. 706

MILTON M. LEVIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner Milton M. Levin respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia, convicting petitioner of larceny in violation of 22 D. C. Code Sec. 2201, and imposing a prison sentence of from six months to two years.

Opinions Below

The Court of Appeals rendered a prevailing opinion by Bastian, Circ. J., and a dissenting opinion by Bazelon, Ch. J., both of which are reported in F. 2d , and are

printed in the appendix accompanying this petition. The case was argued in the Court of Appeals in December, 1963, and decided on June 30, 1964.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1964. Petitioner duly applied for rehearing *en banc*, and his petition therefor was denied on September 22, 1964, with Chief Judge Bazelon and Circuit Judges Fahy and Wright dissenting. On October 13, 1964, the Chief Justice of the United States signed an order extending petitioner's time to file petition for writ of certiorari to and including November 21, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254; 18 U.S.C. Sec. 2(a); 21 U.S.C. Secs. 173, 174; 18 U.S.C. Sec. 371; 26 U.S.C. Sec. 2553(a); 26 U.S.C. Sec. 2554(a); and Rule 17c of the Federal Rules of Criminal Procedure.

Statutes and Constitutional Provisions Involved

The statute involved in the indictment is 22 D. C. Code Sec. 2201. Pertinent constitutional provisions are the First, Fifth and Sixth Amendments to the Constitution of the United States. All of the foregoing are printed in the accompanying appendix.

Facts and Proceedings

Petitioner, a member of the New York bar and a leader in religious and civic circles, was tried alone on the second count of a three-count indictment. The charge against him

was that on or about February 13, 1959, he stole $35,000 which had been entrusted to one James G. Cross, the president of the Bakery and Confectionery Workers' International Union. The trial consumed some eight trial days.

The Government's theory was that petitioner committed larceny by trick in that he obtained the money from Cross on the representation that it would be used to "fix" the judge, jury or both in a perjury trial of Cross which was scheduled for three days thereafter.

The prosecution's case consisted virtually in entirety of the testimony of one James Landriscina, a vice-president of the union, who was charged in the same indictment with conspiracy. He had pleaded guilty to that count (which pleaded a corrupt agreement to procure the acquittal of Cross, through the latter's transmission of $35,000 in union funds to petitioner via one Olson and Landriscina). About two months prior to petitioner's trial, Landriscina had been sentenced to a $2,500 fine. Cross had been named in another indictment, the result of which was his conviction of conspiracy and embezzlement of union funds. The conspiracy count of petitioner's indictment named one Vincent Belloni, the secretary-treasurer of the New York local, as a co-conspirator but not as a defendant.

According to Landriscina, both he and Belloni met petitioner (a member of the New York bar) at petitioner's office in New York in January, 1959 (Tr. 6-7). Both of the union officers had previous dealings with petitioner in connection with a campaign to organize telephone answering girls (Tr. 74, 338-339, 664-666, 779) at a time when petitioner was counsel for a telephone operators' union (Tr. 559-560, 746-765). It was at the New York meeting, said Landriscina, that petitioner said he required from

$35,000 to $40,000 to take care of the Cross case (Tr. 6-7). The sharp contrast with Landriscina's testimony regarding this meeting and that of Belloni is that Belloni told of nothing improper or irregular in the conversation. Belloni testified that they spoke merely of the prospective expenses of defense (Tr. 309-310); that there was not the slightest mention of any contemplated illegal act (Tr. 339); that the word "fix" never entered into the discussion (Tr. 340-343); and that he derived no notion of any planned wrongful or irregular act.

Landriscina then told of an alleged meeting of petitioner with Cross in Washington about February 4, 1959, and then another meeting at which Cross stated that his wife had approved of paying $35,000 to "fix" the case (Tr. 9-13). Then Landriscina told of receiving a call from petitioner on February 10 from petitioner's room in the Congressional Hotel in Washington regarding an appointment two days later; that on February 11 Landriscina called petitioner back at the Congressional Hotel to confirm the meeting for February 12; and that on February 12 Landriscina obtained $10,000 from Olson and paid it over to petitioner as planned (Tr. 15-22).

The falsity of this testimony and its contrived precision as to dates were attested by the check for $35,000 showing it was cashed on February 13, 1959 by petitioner's hotel registration, introduced by the Government itself (Exhibits 5, 25 and 26), showing that his only stays at the Congressional Hotel during the relevant period were from 4:38 P.M. on January 21, 1959, to 1:42 P.M. on the following day, and thereafter from February 15 to February 17, 1959. On February 13, Landriscina continued, he gave petitioner an

additional $25,000 (Tr. 25-26), and they had met Olson on the street the preceding day (Tr. 26-27, 120-121). That the latter alleged encounter was a fabrication was shown by the testimony of Olson himself. While Olson placed the date of meeting Landriscina and another individual on the street as being February 13 (Tr. 199-200, 577-578)—a circumstance in itself unimportant—Olson testified that the man with Landriscina was slim, not heavy-set and weighed about 150; he could not recall whether the man had a mustache; and could not identify petitioner as being the man (Tr. 215-220, 580). The fact is that petitioner has for a number of years weighed from 210 to 218, has a 41-inch waist and has at all times worn a mustache (Tr. 121, 717, 999-1,000), as was proved by two Government witnesses, that he never saw that man again.

Petitioner's proof admitted meeting Landriscina and Cross, but tended to show that the conferences and a subsequent trip by him to Washington were for entirely innocent purposes: namely, to suggest to Cross to take a leave of absence, as suggested by Landriscina, so that the latter might become president of the International if Cross were convicted under the pending indictment (Tr. 158, 671-680); and thereupon to have the International readmitted to the AFL-CIO from which it had been expelled the year before (Tr. 158, 421). The undisputed proof substantiated that both Cross and Olson were suspended (Tr. 69-70); that Landriscina became president and named petitioner general counsel, in which capacity he served for several months in 1961 (Tr. 73-74); and that petitioner assisted in drafting the requisite minutes and resolutions (Tr. 71, 527-531). While Landriscina claimed on the trial to have terminated the counsel representation on the ground of petitioner's unfamiliarity with labor law (Tr. 82-83), the fact is that

he wrote him at the time (Defendant's Exhibit 10), "reluctantly" accepting his resignation and expressing "deep gratitude" for his "generous contribution" to the International during the period of his service as general counsel. Petitioner denied ever having discussed with Landriscina the fixing of the Cross case or the receipt of any money for that purpose (Tr. 699); he quoted Landriscina as saying that Cross had the $35,000 (Tr. 714). Incidentally, Landriscina admitted never having asked petitioner to return the $35,000 (Tr. 88, 112).

Petitioner denied that he met Landriscina in the Statler Hotel on February 13 (a Friday), and it was shown by records (Government Exhibit 23) that he was at the Sheraton Park Hotel from Thursday, February 12, at 5:43 P.M., until Friday, February 13, at 11:30 A.M. He testified positively that he departed Washington on the latter date not later than 1 P.M. (Tr. 501-503, 695, 700-701, 732). In this he was corroborated by his wife (Tr. 923-927), who told of his return home to New York well before 5 P.M. and that it was his invariable habit as an orthodox Jew to be home by that hour for the Sabbath observance. This proof is stressed in view of its importance with relation to one of the points to be urged. Petitioner also called seven character witnesses to certify to his reputation; these included a Catholic priest and a rabbi (Tr. 512, 522, 535, 561, 626, 865, 973-979).

Questions Presented and Reasons for Granting Writ

1. Shall the doctrine which permits conviction in federal courts upon the uncorroborated testimony of an accomplice be extended to include a case in which he is completely impeached, contradicted and discredited by the

other evidence, including documentary proof and the Government's own witnesses?

2. Did the Court's charge, coupled with its attitude throughout the trial, that proof of petitioner's religious habits or practices was not admissible to prove alibi constitute reversible error?

3. Was it reversible error for the trial Court to exclude material testimony of petitioner's religious habits?

4. In a criminal prosecution, wherein defendant in support of an alibi has offered evidence of his devout observance of his religion, was it reversible error for the trial Court to exclude and deprive defendant of the benefit of expert testimony of an ordained Rabbi to show the orthodox ritual requirements of the Jewish faith in this regard and explain their significance?

5. May an appellate court determine as matter of law that a devout person's observance of his religious obligations is so transitory and whimsical as to be entirely volitional and devoid of probative value?

6. Where funds of a union were stolen by its president for his individual benefit and without defendant's knowledge, may defendant, whose only transaction, if any, was with the individual, be charged with larceny by trick of union funds?

7. Can the evidence support a conviction of larceny by trick under the indictment as drawn?

8. Was it reversible error to withhold from the jury the grand jury testimony of the Government's chief witness when it was sharply at variance with his testimony on the trial?

9. Was the United States attorney's closing argument referring to matters not in evidence as facts, and attempting thereby to impeach important aspects of the defense, prejudicial and reversible error?

These will be considered seriatim.

ARGUMENT

QUESTION NO. 1

Shall the doctrine which permits conviction in federal courts upon the uncorroborated testimony of an accomplice be extended to include a case in which he is completely impeached, contradicted and discredited by the other evidence, including documentary proof and the Government's own witnesses?

In our discussion of the facts and proceedings we have pointed out how effectively the sole witness and accomplice Landriscina was contradicted by the Government's witnesses Belloni, Ashby and Olson in particulars of crucial importance, including the alleged identity of petitioner, as well as by records as to hotel registration, the withdrawal of funds, a check and other vital matters. Under another caption we have adverted to the sharp discrepancies between Landriscina's trial testimony and that which he gave before the grand jury. All the foregoing are quite apart from petitioner's own proof, including the alibi. Landriscina was the witness described by Chief Judge Bazelon as the only witness "implicating appellant . . . and . . . in fact impeached" and "his testmony . . . contradicted by other prosecution witnesses" (op., p. 13a).

This leads us to the vexatious problem of the extent to which the much criticized rule of conviction on the uncorroborated testimony of an accomplice should be followed.

In *Caminetti* v. *United States*, 242 U.S. 470, 495, following *Holmgren* v. *United States*, 217 U.S. 509, it was held (in a case in which three justices dissented) that there was no absolute rule of law preventing convictions on the testimony of accomplices. Even there Mr. Justice Day said for the Court:

> ". . . It was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence."

See also *Krulewitch* v. *United States*, 336 U.S. 440, 454 (concurring opinion of Mr. Justice Jackson).

It has been pointed out that to justify sustaining a conviction on such testimony, it must be "not otherwise incredible or unsubstantial on its face." *Esters* v. *United States* (C.A. 8), 260 F. 2d 393.

Recently, in *Lyda* v. *United States* (C.A. 9), 321 F. 2d 788, an accomplice is described as possessing "a built-in untrustworthiness," and the Court observed (by Duniway, Circ. J.):

> "Obviously there comes a point when the witness' qualifications are so shoddy that a verdict of acquittal should have been directed."

The Court cited as an illustrative case *United States* v. *Haderlein* (D.C. Ill.), 118 F. Supp. 346, where a motion for acquittal was granted. There the sole witness against de-

fendant was an accomplice who had testified somewhat differently before the grand jury. Perry, D. J., wrote:

> "The reliability of this testimony as the sole basis for conviction of a defendant needs no further comment. If this type of testimony alone and uncorroborated should be held to convict a person of crime beyond a reasonable doubt such ruling would represent a new milestone in Anglo-American jurisprudence. It would well lead in the direction of a police state in open defiance of the traditional personal safeguards of our federal constitution."

Other decisions, even after *Holmgren*, have refused to permit convictions in such situations. Among such was *Sykes* v. *United States* (C.C.A. 8), 204 F. 909, which cited *Holmgren* but still held:

> ". . . The conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it."

So Landriscina, the accomplice, the obvious and admitted wrongdoer, was not charged with any crime which would disqualify him from holding office under the Landrum-Griffin Act (29 U.S. Code Sec. 504), with the result that he continues as president of his local at an annual $20,000 salary in flagrant disregard of the spirit and purpose of that act.

Likewise, in *McGinniss* v. *United States* (C.C.A. 2), 256 F. 621, it was held that the unsupported testimony of an

accomplice who was discredited by his own testimony presented no substantial evidence requiring submission to a jury.

Following this principle, in *Smith v. United States* (C.A. 5), 224 F. 2d 58, the Court apparently recognized the doctrine "that the testimony of a co-conspirator must be received with caution and should be corroborated, as here, by other evidence."

The cases dealing with divers aspects and niceties of the accomplice testimony rule are most numerous, and no useful purpose is now to be served by extended analysis and differentiation. We do not believe that any sound rule deducible from the authorities requires that a conviction be upheld when it rests upon such transparently untrustworthy and solidly refuted proof as was advanced herein. Certainly the question arises in its many ramifications with such frequency as to impel this Court to reexamine the applicable law and to determine authoritatively whether lower courts may categorically rule—as was done several months ago in *Williamson* v. *United States* (C.A. 5), 332 F. 2d 123 (advance sheets of July 6, 1964) that "the law permits conviction in the federal court on the uncorroborated testimony of an accomplice." Surely some of the other reported cases to which we have made reference appear to indicate contrary views in other circuits, and there is at least grave doubt whether the Supreme Court of the United States adheres to so manifestly questionable a doctrine, or is disposed to extend it to cases wherein the accomplice who is the sole witness is completely impeached and discredited. The present case seems opportune for consideration of the *Caminetti* holding, which

this Court has not referred to in the accomplice connection for more than twenty-five years. In the interests of justice and for the clarification of the principles governing this much-litigated question, we submit that the time is ripe for authoritative declaration on the subject.

QUESTION NO. 2

Did the Court's charge, coupled with its attitude throughout the trial, that proof of petitioner's religious habits or practices was not admissible to prove alibi constitute reversible error?

This point is closely allied with the question of the admissibility of habit evidence, discussed under Question 3.

Apart from disagreeing with the majority on that subject, Chief Judge Bazelon was greatly disturbed by the observations and view of the trial Court, including its conduct of the trial and the subsequent charge, which had the effect of depriving petitioner of the benefit of evidence on this subject. Thus the Chief Judge wrote (after discussing petitioner's proof of his religious habit in support of the alibi):

> "But I think the value of their testimony was vitiated by the court's erroneous rulings and charge. Because the question of guilt was close, I think these errors require reversal of the conviction.
>
> "The court told counsel that habit evidence was irrelevant. See Tr. 627-34. It also told counsel it would instruct the jury that evidence of the defendant's habit of doing something is no proof that he did so on a particular occasion, Tr. 634, and that all matters with respect to habit and custom were

to be excluded and stricken. Tr. 633, 925. On one occasion the court cut off questioning when defense counsel began inquiring into appellant's habit, saying in the presence of the jury:

> 'Mr. Stein, we are not concerned here with what Mr. Levin has done all the rest of his life.' (Tr. 627)

All this may well have discouraged defense counsel from attempting fully to explore the matter with any witness, and may well have led the jury to believe it could not consider appellant's habit in determining whether he had or had not met Landriscina and received the money at 5:00 on a Friday afternoon.

"If there was any question about this in the jurors' minds, it must have been resolved by the court's charge. The court told the jury:

> 'It is my recollection that Mr. Levin testified, as did other witnesses, that he has a habit or practice of a religious nature whereby he stays at home from sundown Fridays to sundown Saturdays. You are told that proof of such a habit or practice is not proof that the defendant is never elsewhere at that particular time.'

The majority, in finding that this charge was not erroneous in the circumstances here, says:

> 'Proof of habit, for religious reasons, to be at home on Friday evenings clearly is not *conclusive* proof that the person having the habit may not be elsewhere on occasion and particularly on the spe-

cific Friday evening in issue.' (Emphasis supplied by the Chief Judge.)

Such a charge would have been correct. But the charge given did not use the word 'conclusive'; it said proof of the habit is 'not proof.' In light of all that had gone before, and especially the court's statement of how it expected to charge the jury, I cannot assume the omission of the word 'conclusive' was unlikely to mislead the jury. Rather, it fits the pattern, consistently maintained throughout the trial, of not allowing the jury to consider habit evidence in relation to Levin's alibi.''

We can add little to the foregoing scholarly analysis of the proceedings on the trial—the repeated rulings and the instructions—and how they operated to deprive petitioner of any benefit whatsoever that might be inherent in evidence of habit. Should the Court be in accord with our contention that such evidence is admissible and deserving of consideration with such weight as the jury may give it along with the other proof in the case, it must necessarily follow that petitioner was deprived of a fair trial.

QUESTION NO. 3

Was it reversible error for the trial Court to exclude material testimony of petitioner's religious habits?

This point is apart from the separately argued question of the right to present expert proof of religious requirements.

Petitioner offered to prove through the witness Rabbi Isaacson the significance of petitioner's habit to be at home on the Sabbath (Tr. 866-868) as being implicit in the religious requirement to refrain from work, and the trial Court ruled such testimony to be inadmissible. This ruling is the subject of extended discussion in both the prevailing and dissenting opinions of the Court of Appeals, the former holding that an individual's religious practices would not be the type which could be described as being of "invariable regularity;" that the "very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value" (op., p. 13a).

Nothing is more plain on principle than the proposition that evidence of habit has probative value. As Wigmore said (1 *Evidence* [3d ed. 1940] §92, p. 519):

> "Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough:
>
> "1861, Flandrau, J., in *Walker* v. *Barron*, 6 Minn. 508, 512: '[Customs] may, like any other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act hav-

> ing been done or not done, which act is the subject of contest.'
>
> "1873, Sargent, C.J., in *State* v. *Railroad*, 52 N.H. 528, 532: 'It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, [according] as he is in the habit of doing or not doing it.' "

The result is that in the overwhelming majority of the cases, see *id.* §93, evidence of custom and habit has been uniformly admitted. Indeed, in the Federal courts, there has been no doubt on the point since the days of Chief Justice Marshall. Thus, in *Bouldin* v. *Massie*, 7 Wheat. 122, 152-153, an official's fixed habit of never recording a land warrant without the production of an assignment was admitted by the trial judge and regarded as significant by the Supreme Court.

In *Chitwood* v. *United States*, 153 Fed. 551 (C.A. 8), a prosecution for embezzling material from a letter in the mail, the issue was whether the defendant, a mail clerk, had, as some witnesses testified, taken the articles after opening the letter, or whether, as he contended, they had fallen out of the letter and had been put aside to be turned over to the superintendent. Defendant called three clerks to testify that for two months prior to the night in question it was usual for letters and packages to be received in bad condition, so that inclosures would fall out. Exclusion of that testimony was held (p. 552) reversible error.

Similarly, in *Security Mut. Life Ins. Co.* v. *Kleutsch*, 169 Fed. 104 (C.A. 8), the issue was whether a premium had been paid. On this issue, the company was permitted to show that the decedent habitually paid by check, while the

beneficiary was similarly permitted to introduce evidence showing that the insured was in the habit of carrying considerable sums of money in his pocket, and that he frequently paid obligations in cash.

In *Eaton* v. *Bass,* 214 F. 2d 896 (C.A. 6), an action for personal injuries, a defense witness testified that it was the custom of the company to check every truck for safety before putting it out on the road. This was held proper on appeal, the Court saying (214 F. 2d at 899):

> "The evidence was not received for the purpose of proving that appellees were not negligent because they followed a custom generally in use in the particular industry. It was offered and received for the purpose of proving the existence of a particular fact, namely, that the truck was inspected in a certain way, leaving open the question whether such inspection, if it did take place, was sufficient to constitute due care. No evidence was offered or received pertaining to the custom of other truck operators, with which the particular inspection by the appellees would be compared. We think the District Judge ruled correctly in admitting the evidence on the ground that it had probative value on the issue of what, if any, inspection the truck received before being sent out on the highway, but at the same time pointing out that it was not conclusive that the particular truck was so inspected, and that whether it was or was not so inspected was still a question for the jury."

Finally, in *Howard* v. *Capital Transit Co.,* 97 F. Supp. 578 (D.D.C.), Judge Pine, in a personal injury case where no one could identify the decedent as having been on the bus that suffered the accident, admitted evidence of his

possession of a weekly pass as (p. 573) "showing the habit or custom of deceased in using defendant's buses to return home from his place of employment."

On the authorities, therefore, appellant's proffered evidence was plainly admissible.

The prosecution argued that there was no necessity for admitting any evidence of habit, because of (1) the existence of direct evidence on the alibi issue, (2) the asserted inconvenience of a collateral issue, and (3) the contention that the issue was covered by character evidence.

These afterthoughts carry no conviction.

(1) There is no Federal case excluding evidence of habit simply because eye-witness evidence is available, and as a matter of logic the proposition simply does not make sense.

For, although alibi is not an affirmative defense that the defendant must himself establish, but rather just another issue on which the burden of proof remains with the prosecution (*Thomas* v. *United States,* 213 F. 2d 30. 33-34 (C.A. 9), citing cases *accord* from six other circuits), in fact alibi involves a negative, with the inevitable result that it is always a difficult proposition to establish. Here the direct testimony of alibi, from appellant (Tr. 699-700) and his wife (Tr. 926-927), was subject to a heavy discount for interest. Certainly he was in consequence entitled, in view of the thin and contradictory case against him in respect of the alleged payment (App. Br. 36-40, Point IID), to introduce every bit of evidence available to buttress his own denial.

(2) In the present case the evidence as to habit and religious obligation would have raised no collateral issue. There was one vital issue and only one:

Did Landriscina pay appellant $25,000 in McPherson Square in Washington around 5 P.M. on a Friday evening, as Landriscina, alone of all the prosecution's witnesses, testified (Tr. 25-26, 125-126, 144)? Or was appellant, an Orthodox Jew, in New York at that very moment celebrating the Sabbath with his family (Tr. 699-700, 926-927), prohibited by his faith both from travelling and from handling money?

A multiplication of evidence bearing on a single vital issue in no sense constitutes the production of collateral issues. Significantly enough, Rabbi Isaacson's testimony was not excluded on any such ground (Tr. 868, 924-925, 1026-1030).

In accord with our views is the American Law Institute's Model Code of Evidence, which on this point lays down the following:

> "RULE 307. EVIDENCE OF HABIT OR CUSTOM TO PROVE BEHAVIOR.
>
> "(1) Habit means a course of behavior of a person regularly repeated in like circumstances. Custom means a course of behavior of a group of persons regularly repeated in like circumstances.
>
> "(2) Evidence of a habit of a person is admissible as tending to prove that his behavior on a specified occasion conformed to the habit. Evidence of a custom of a group of persons is admissible as tending to prove that their behavior on a specified occasion conformed to the custom.

> "(3) As tending to prove habit or custom under paragraph (2),
>
> "(a) a witness may state his opinion under Rule 401, and
>
> "(b) evidence of specific instances of behavior of the person or the group of persons is admissible if the proponent offers admissible evidence of a sufficient number of such instances to warrant a finding of the habit or custom."

It is to be regretted that the Court saw fit in this case to rely on Chamberlayne's *Modern Law of Evidence* and Jones' *Commentaries on Evidence* (Op. 12; 14 at note 10), works that must be regarded as singularly unauthoritative and that undoubtedly are dated, in preference to the views of the acknowledged master of evidence, Dean Wigmore, and to those of the numerous distinguished scholars who compiled the Model Code of Evidence that the American Law Institute promulgated in 1942.

In *Hadley* v. *B. & O. R. Co.* (C.A. 3), 120 F. 993, it was held that evidence of an intoxicated person's usual and customary reactions while in that condition was relevant and material, the Court citing the familiar aphorism from Wigmore, 3d ed., Sec. 10: "All facts having rational probative value are admissible unless some specific rule forbids."

Other pertinent federal cases upholding the admissibility of proof of habit are *Thatenhorst* v. *United States* (C.C.A. 10), 119 F. 2d 567, and *Commercial Standard Ins. Co.* v. *Gordon's Transports* (C.C.A. 6), 154 F. 2d 390. The latter case held:

> "There can be no doubt of the probative value of a person's habit or custom as showing the doing, on a specific occasion, of the act which is the subject of the habit or custom."

The general rule is thus set forth in 32 C.J.S. 710 (1964 revision):

> "Evidence of a course of conduct or dealing may be admitted where pertinent to an issue in the case. Thus, when, in the opinion of the court, a course of conduct or dealing on the part of a given individual is established as to render its continuance to the time involved in the issue probable, its existence may be used as evidence that he acted in accordance with it on a particular occasion, provided such course of conduct is shown to have been continuous and systematic, and that the conditions in the particular case are the same as, or similar to, those to which the custom is applicable."

Where the particular habit sought to be proved has the sanctity of a religious obligation, the habit may well be one involving regularity of action to such a degree as to be a way of life, and therefore of probative value. Once the relevancy of the proffered proof is recognized, and observance of the Sabbath is a Commandment, Exodus XX 8-11, the Court need not be concerned with its weight, for, as stated in 1 Wigmore Sec. 29 (italics in original):

> " . . . The evidentiary fact offered does not need to have strong, full, superlative, probative value, *does not need to involve demonstration* or to produce persuasion by its sole and intrinsic force, but merely to be *worth consideration by the jury*. It is for the jury to give it the appropriate weight in effecting persuasion."

The foregoing proposition was quoted with approval by the Second Circuit in *United States* v. *Kahaner*, 317 F. 2d 459, 471.

Since the special Committee on Evidence appointed by the Chief Justice of the United States has reported that "the formulation of uniform rules of evidence for the Federal courts is both feasible and desirable",* it would be unfortunate if any Circuit were to lay down a rule at variance with the fairly recent formulation by an able panel in the Sixth Circuit, in an area untouched by statute and where both courts are equally bound by Rule 26, F. R. Crim. P., to proceed "in the light of reason and experience." *Eaton* v. *Bass*, 214 F. 2d 896.

The difference between the views expressed herein by the Court below and those followed in other circuits in this regard are an added reason for the Supreme Court's assumption of jurisdiction.

QUESTION NO. 4

In a criminal prosecution, wherein defendant in support of an alibi has offered evidence of his devout observance of his religion, was it reversible error for the trial Court to exclude and deprive defendant of the benefit of expert testimony of an ordained Rabbi to show the orthodox ritual requirements of the Jewish faith in this regard and explain their significance?

As has been indicated in our discussion of the evidence, proof that defendant was at home in New York on the crucial Friday evening in question would have operated to demolish the prosecution's case. In addition to the direct

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* *Rules of Evidence.* A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts. February 1962. p. 48.

testimony of the defendant and his wife in support of that fact, petitioner sought to discredit the testimony of accomplice Landrascini, by showing that for the event to have happened at the time, place, and manner as Landrascini would have the jury believe, the defendant would have been called upon to violate the cardinal principles of his religion, i.e., violate the Sabbath, and that he, an orthodox Jew, would not have breached the sanctity of the Sabbath. "The law of the Sabbath is equal to all the other laws and commandments in the Torah . . . " Jewish Encyclopedia, Vol. X pp. 586-602. See Exodus, XX 8-11.

Accordingly, defendant proposed to call as his witness, Rabbi Isaacson (Tr. 866-868), "as an expert to testify . . . what orthodox ritual requires." Thus Rabbi Isaacson was called in his professional capacity to inform and explain to the jury the holiness of the Sabbath and the obligation of the devout in the observance. Although Rabbi Isaacson was the only expert called by the defendant, this testimony was excluded (Tr. 868).

Such ruling is in conflict with the holdings of the Tenth Circuit, where the rule is that the testimony of an expert may not be arbitrarily rejected nor ignored. *U.S.* v. *Gower*, 50 Fed. (2) 370, 371; *Boston Insurance Company* v. *Leach*, 50 Fed. (2) 551.

To illustrate, had Rabbi Isaacson's testimony been received he would have told of the strong compulsion of Sabbath observance which is thus described in National Encyclopedia, vol. 9, p. 2 (article by Rabbi Abraham I. Shinedling, noted research editor and authority):

> "Despite its weekly occurrence the Sabbath is of greater importance than any of the Jewish festivals . . .

> " . . . the Sabbath among the Jews was observed as the great festival of joy and celebration. Special Sabbath clothes were worn by men, women and children, the table was specially adorned with the best foods and the whitest linen in honor of the Sabbath. The Sabbath candles were lighted by the housewife, the Sabbath loaves (called challah, a reminiscence of the shew-bread of the ancient Temple of Jerusalem) were placed upon the table and the blessing for them and the wine (Kiddush) recited by the master of the house. In the synagogue and in the home special hymns were sung as a greeting to the Sabbath, which was allegorically conceived as the bride, the inseparable companion of Israel. Most of these observances are still practiced today in tens of thousands of Jewish homes and synagogues in all parts of the world."

and, as stated in the Jewish Encyclopedia, Vol. 10 pp. 586-602:

> " . . . all work, however important should cease as soon as the Sabbath approaches. . . .
>
> "In both Decalogues is included the prohibition against performing any work on the Sabbath day. Ex. XXXI 15, XXXV 2.
>
> "The Rabbis forbid also the handling on the Sabbath day of objects that are 'set aside' for work prohibited on that day. For instance, it is forbidden to handle money. . . ."

It is also noteworthy that there came a time in Jewish history when the "observance of the Sabbath became the badge of distinction between the faithful and the lukewarm," Funk and Wagnalls New Standard Bible Dictionary, 3rd Ed., p. 732.

Without the aid of the Rabbi the jury could not be expected to know the requirements of Sabbath observance of the orthodox Jewish faith and the response of the devout to these sanctions. The jury was thus set adrift to consider without guidance the acts attributed to the defendant without the benefit of understanding the rebuttal value of defendant's devotion to his Sabbath. There is no recognition of ecclesiastical matters as being self-evident, and no judicial notice is taken of religious customs. *State* v. *Dunn*, 161 La. 532; *Friedman* v. *Swift & Co.*, 18 F. Supp. 596; *Rector, etc.* v. *Collett*, 208 A.D. 695, 204 N.Y.S. 315; Underhill on Criminal Evidence, 4th ed., sec. 70. Accordingly, expert testimony is admissible as to customs, including specifically ecclesiastical matters. 32 C.J.S. 139, 142.

Thus, the Rabbi was not called as an expert to establish the alibi, but to enable the jury to understand it.

In this connection there remains to be considered the significance of the Rabbi's testimony. If after being fully informed of the significance of the Sabbath, and its overriding obligation upon the faithful to refrain from all manner of work, and the jury were given such understanding and guidance, it would be far less likely to come to the conclusion that a deviation from the Sabbath is nothing more than an inconsequential peccadillo. Furthermore, were such violation demonstrated to be a most serious sin, that view might well have controlled the verdict. But here the jury was deprived of any such enlightenment in aid of its deliberation. In *Halliday* v. *U.S.*, 315 U.S. 94, this Court stressed the significance of expert opinion even where the Circuit Court had regarded it as having little probative force.

It should be noted that the Court below emphasized that "the prosecutor did not dispute his [defendant's] general habit to be at home on Friday evenings, but only his whereabouts on a particular Friday evening" (op., p. 15). And it is here that we note the Court has misconstrued the entire thrust of petitioner's defense, and the role of the expert (Rabbi). For the defendant did not speak of an empty habit or whim which is developed by the person to suit his needs or idiosyncrasies—rather we have a way of life, a course of conduct, a habit, which stems from the compelling obligation and strict conformity required of the devout by their religion. In *U.S.* v. *Ballard*, 322 U.S. 78 (citing *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304), this Court declared (by Mr. Justice Douglas) "Religious experiences which are as real as life to some may be incomprehensible to others."

Thus, was the defendant home on Friday nights in answer to his personal or private needs and practices or was he observing the dictates of his religion which required that he refrain from any manner of work on the Sabbath, so that he rested at home? Rabbi Isaacson was the vehicle whereby the defendant sought to explain to the jury just why he would not and could not be participating in those acts attributed to him by the accomplice Landrascini. Such defense was foreclosed to petitioner when the Court rejected Rabbi Isaacson as an expert.

The jury might seriously have considered the question that if the defendant could induce Cross and Landrascini to part with so substantial a sum of money, could he not have required that delivery be made on a more convenient day?

It is difficult to assess the basis for the rejection of the Rabbi's testimony on matters relating to the Jewish religion. The proffer of evidence was clear. Wigmore, 3rd ed., sec. 1907, specifically enunciates the proposition that witnesses should be limited only where they are so numerous as to result in the stifling of the truth and not in its revelation.

Different religions and different creeds impose varying requirements upon their devout in the manner of the observance of their respective Sabbaths. In this case the jury was denied the opportunity to hear and receive information from an expert bearing upon the very heart of petitioner's alibi, which would have enabled the jury to understand the profound religious sanctions involved. Indeed, Wigmore, 3rd ed. at footnote 4 to sec. 136, citing *State* v. *Delaney*, 92 Ia. 467, states that all facts tending to prove the alibi are admissible. Certainly the testimony of the Rabbi which would have enabled the jury to evaluate the defendant's alibi was inherent in that alibi.

On the other hand, the failure of the defendant to have called an expert would be considered evidence of a weak case. Wigmore, 3rd ed., sec. 290. It may well follow that the exclusion of the Rabbi's testimony as an expert may have caused the jury to discount or disregard the religious force of the alibi.

The total error of the exclusion of the expert testimony is brought into focus when it is noted that Rabbi Isaacson was permitted to join the preceding witnesses in testifying as to defendant's character; but as the only witness qualified to explain to and inform the Court and jury of the significance and underlying motivations of the defendant's

alibi as it related to religious requirements, his expert testimony was excluded. Wigmore distinguishes between the usual testimony of laymen who have no better knowledge than that of the jury and may be excluded as superfluous and the witness who has special experience and qualification over and above that of the jury and therefore materially admissible. Wigmore, 3rd ed., sec. 557.

QUESTION NO. 5

May an appellate court determine as matter of law that a devout person's observance of his religious obligations is so transitory and whimsical as to be entirely volitional and devoid of probative value?

The Court of Appeals herein conceded in the prevailing opinion (p. 11a) that "evidence of habit is of *some* probative value." However, the Court proceeded to hold (Op., p. 13a) that one's religious practices were not of the type of "invariable regularity" in view of their "volitional basis" and hence of no probative value. The very passage from Chamberlayne, Modern Law of Evidence, Sec. 3204, quoted by the Court does not bar such proof but simply observes that the probative strength of the habit is in proportion to the extent to which it assumes automatic character.

To establish as matter of law that a person's religious training and activities, however deeply ingrained, are so fleeting and casual that they are mere acts of volition rather than an abiding response to a compelling obligation, strikes at the very heart of religious concepts. Such a declaration by a court is contrary to the spirit, if not the letter of the Constitution.

Certainly, the rejection by the Court below of the expert opinion of a theologian on matters religious on its declaration that a man's religious beliefs are "so volitional" as to "without probative value" strike at the very foundation of religion's inherent purpose to give direction to the devout and to afford a firm guide that is neither volitional nor optional. From the holding sought to be reviewed the logical conclusion would be that religion is without depth, to be accepted or rejected as a mere matter of convenience. This would in effect pronounce as law, standards of the values of religion and its impact upon the faithful.

That religious practices are not volitional to the devout but rather a dedication to a way of life even to the point of sacrifice has been recognized by this Court in *Braunfeld* v. *Brown*, 366 U.S. 599, 606. Nor may freedom of religion be infringed by the denial, even though the adoption of an illogical rule of evidence or the enactment of a discriminatory statute, or the imposition of a condition upon any of its benefits or privileges. See *Sherbert* v. *Verner*, 374 U.S. 398.

This Court has repeatedly recognized depth of religious values and the need for their preservation. Apart from purely spiritual benefits, the devout individual is not to be denied the temporal gains inherent in his beliefs; if they serve to enhance his standing in the community, he surely should not be deprived of such immediate reward. Were Congress to enact a statute excluding from evidence in any trial proof that a certain claimed course of conduct was enjoined upon a person by strict religious tenets, such law would surely have the fringe effect of denigrating certain sects and curtailing the free exercise of religion. To uphold a judicial declaration to the same end violates the spirit of

the First Amendment, for the fiat of a court may not exceed Congressional power. In the language of Mr. Justice Douglas in *Zorach* v. *Clauson*, 343 U.S. 306:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

QUESTION NO. 6

Where funds of a union were stolen by its president for his individual benefit and without defendant's knowledge, may defendant, whose only transaction, if any, was with the individual, be charged with larceny by trick of union funds?

The Government's proof, in the light most favorable to the prosecution, shows that the defendant, by means of false representations to the individual James Cross, sought to defraud him of certain sums of money. Cross, to obtain such money for his personal needs, purposes and gains, abused his powers as President of the Union, and stole his required money from the Union treasury and in fact was convicted of embezzlement. It is undisputed that the defendant had no knowledge of Cross's criminal act. Landriscina himself testified that he never knew that the

money allegedly turned over to the Defendant was union funds until 1960 (Tr. 175).

The indictment, however, charges the defendant with statutory larceny "by trick" from the Union. To sustain a conviction under this indictment of larceny "by trick" the prosecution is required to prove 1) false representation, 2) of a material fact, 3) made with knowledge of its falsity, 4) with intent to deceive, 5) and the reliance upon the representations. *Pence* v. *United States*, 316 U.S. 332, 338, quoted in *United States* v. *Kiefer*, 97 App. D. C. 101, 102; 228 F. 2d 448, 449, certiorari denied 350 U.S. 933.

These components that constitute larceny "by trick", if at all attributable to the defendant, are in relationship to his alleged dealings with the individual Cross in the latter's personal capacity. Defendant had no transaction or other communication with the union. A representation made to third parties is insufficient to support the crime of larceny "by trick", even if it is ultimately intended to be reported to the victim. 35 C.J.S. 851.

The fact that Cross found it convenient for his own interest to steal his Union's funds, cannot support a statutory larceny "by trick" of these funds by the defendant. The representations must be made to the injured party (here, the Union), that party must rely upon the representations, and if the evidence or its tendency failed to show such representations, the defendant must be acquitted. *Young* v. *State*, 116 So. 709, 710, 22 Ala. App. 443.

A person cannot be convicted of the crime of larceny "by trick", unless it is shown beyond a reasonable doubt that he made the false representation to the person from whom the money was intended to be obtained. *Young* v. *State*, *supra*.

QUESTION NO. 7

Can the evidence support a conviction of larceny by trick under the indictment as drawn?

(a) The record failed to establish that Cross was "entrusted" with the funds.

(b) The indictment as laid, could not support a conviction for "stealing" union funds, under the facts adduced upon trial.

(a) The Court of Appeals held (Op., p. 6a) that the Government was requested to show, among other things, that the money received from the Union was the money "entrusted" to Cross. The record is barren of any evidence which would establish that Cross was entrusted with the Union's funds. The persons vested with such trust are established by the membership and set forth in the Constitution of the International. The constitution is not in evidence. The subject monies were withdrawn under the authority of the Finance Committee (Gov't Ex. 4, Tr. 44), the check (Gov't Ex. 5) was signed by both President Cross and Sec.-Treas. Olson, neither of whom was a member of the Finance Committee, and payable to Olson who cashed same. Thus the record establishes that union funds were "entrusted" to the Finance Committee, and not to Cross.

(b) The Court of Appeals held it no defense that defendant stole only from Cross (and not from the Union), relying upon the proposition that one who steals from a thief may be prosecuted notwithstanding the illegality of the victim's possession (Op., p. 4a).

Petitioner, of course, has denied any theft, but respectfully shows that the foregoing doctrine expressed by the

Court of Appeals in support of the conviction is self-defeating. It admits that two separate crimes were committed (a) by Cross from the Union, (b) by defendant from Cross. But the indictment itself makes no such charge. The only crime alleged is the crime against the International Union, and if the prosecution urges (as the Court of Appeals found) that crime against the Union flows from the crime against Cross, both crimes must be alleged. *Stirone* v. *U.S.*, 361 U.S. 212.

As the indictment alleges only the crime against the Union, the proof of the crime against Cross would be an enlargement of the indictment and therefore fatal to the prosecution (*Ex Parte Bain*, 121 U.S. 1, 10), and violative of petitioner's constitutional rights under the Fifth Amendment. As concededly there are two separate and distinct crimes that are essential to convict the defendant of "stealing" the Union funds, and only one crime is alleged, the indictment cannot support a conviction. *Stirone* v. *U. S.*, 361 U.S., 212; *United States* v. *Hess*, 124 U.S. 483.

In order to support a conviction of the defendant for stealing union funds as here claimed, the indictment should properly have pleaded " . . . did unlawfully, feloniously and wilfully steal and take and carry away the property of Bakery and Confectionary Workers International Union of America, an unincorporated association, *which property had prior thereto been stolen or embezzled by James G. Cross, President, and which on or about the 13th day of February, 1959 the defendant did steal from said James G. Cross.*" Under the *Bain* and *Hess* decisions, *supra*, the defects are jurisdictional and any verdict in consequence is invalidated.

QUESTION NO. 8

Was it reversible error to withhold from the jury the grand jury testimony of the Government's chief witness when it was sharply at variance with his testimony on the trial?

We have repeatedly shown that the Government's case depended in its entirety upon the credibility of the witness Landriscina. At the close of recross examination (Tr. 187) and before the witness left the stand (Tr. 194), petitioner's counsel moved for the production of Landriscina's grand jury testimony. It was not until a week later (Tr. 737-761) that the Court read to counsel, in the absence of the jury, certain portions of the grand jury testimony, beginning with p. 35 and extending to p. 100 thereof. Since the excerpts are contained in some 24 pages of the present transcript—and these interlarded with the colloquy and the Court's comments—it is a fair inference that the portions read constituted perhaps one third of the grand jury testimony of the witness.

The trial Court concluded summarily that there were no contradictions. Certainly the oral quotations of portions was not calculated to afford a reasonable opportunity to make careful comparison with testimony given a week before. Actually, once the transcript is available, a defendant in all fairness should be given the right to examine it. *Gordon* v. *United States*, 299 F. 2d 117; *De Binder* v. *United States*, 292 F. 2d 737.

Subsequent analysis of even those parts read by the Court showed at least four significant contradictions. Thus on the trial the witness told of having made the final payment to petitioner on February 13 at 5 P. M., just as it was

getting dark (Tr. 25-26, 125-126), whereas before the grand jury he said he first met him at 6 P. M. (Tr. 757-759). It is easy to infer that Landriscina decided on the trial to advance the pretended hour so as to make it more in consonance with petitioner's early suspension of business on a Friday. Secondly, on the trial the witness was quite exact in saying he left Mr. Williams' office at 4:35 or 4:45 P. M. (Tr. 126), but before the grand jury his version was that he waited there until about 5:15 P. M. (Tr. 757). Thirdly, his elaborate trial testimony regarding his receipt of the $35,000 from the union office made no mention of a conversation with Cross, whereas before the grand jury he testified regarding three such transactions prior to the alleged 6 P. M. meeting with petitioner. It may be noted that this discrepancy might have bearing upon the theory of the charged larceny of union funds. Finally, on the trial his story was that he considered the money that of Cross (Tr. 173), but his grand jury testimony advanced the hypothesis that it was the same money Cross said he wanted for the local.

We are thus confronted with a situation wherein the prosecution's star witness was shown to have testified differently before the grand jury—only about six months before the trial (Tr. 761). The Government has heretofore sought to minimize the contradictions as being of minor consequence, a position with which petitioner must take issue. In a case where the determination of credibility is the cardinal problem, the cumulative effect of a series of differences might well have sufficed to turn the scales the other way—especially when the witness under consideration is refuted by practically all other persons testifying in the case, as well as by documentary evidence.

We are familiar with this Court's holding in *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, that the so-called Jencks Act (18 U.S.C. Sec. 3500) is not regarded as being applicable to grand jury minutes, whose disclosure is ordinarily left to the discretion of the judge. However, even there it was ruled (see p. 400) that where a need therefor is shown, such need outweighs the policy of secrecy and disclosure is proper to promote the ends of justice. See also *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 234.

In the Second Circuit it has been held (*United States* v. *Annunziato,* 293 F. 2d 373) that the grand jury minutes need not be available to the defense where the judge has and *correctly* found no inconsistency, whereas the same Court ruled (*United States* v. *Spangel*[illegible], 258 F. 2d 338), in another case that it was error for the trial judge to find no inconsistencies when in fact they were present. Disclosure of grand jury minutes is properly granted where there is a compelling need therefor and it is required by the ends of justice. *Allis-Chalmers Mfg. Co.* v. *City of Ft. Pierce,* 323 F. 2d 233. And inconsistent testimony of an arresting officer suffices to establish the need for the grand jury testimony. *Harrell* v. *United States,* 317 F. 2d 580.

The question under consideration involves a difference in the approach by the several circuits. Thus, in the recent Third Circuit holding in *United States* v. *Boyance,* 329 F. 2d 373, the Court pointed out a conflict in the procedure followed with regard to this matter, noting that the District of Columbia, the Fourth, Eighth and Tenth Circuits required a showing of a particularized need before the transcript could be examined, although the circumstances which

have been found to establish such an exigency are varied. The Court then noted:

> "On the other hand the Second Circuit appears to require no showing of a particularized need."

This difference in the circuits is surely a matter of importance which should alone suggest review by this Court.

QUESTION NO. 9

Was the United States attorney's closing argument referring to matters not in evidence as facts, and attempting thereby to impeach important aspects of the defense, prejudicial and reversible error?

The United States Attorney, during his summation, and when the defendant was deprived of the opportunity of rebutting it, made statements to the jury on matters not in evidence. These remarks were tantamount to testimony by the prosecutor, and such conduct is so prejudicial that even if objection is not taken, a conviction must be reversed.

The summation of the United States Attorney went dehors the record to present as factual, certain matters concerning which no evidence had been offered.

Thus he urged (Tr. Arg. 61) in substance that petitioner's claim of orthodoxy was refuted by his admission that he had eaten in two Italian, non-Kosher restaurants. There was no evidence in the case of the character of the food served in either of these restaurants.

Furthermore, the Jewish dietary laws relate only to the food eaten and not to the localities in which it is served. See 4 Jewish Encyclopedia 596-600. Petitioner had no op-

portunity to rebut either the fact claimed nor the argument based on it. In consequence, the inference is strong that the jury accepted this wholly unjustified attack upon petitioner, and may well have concluded that his claim of orthodoxy, so vital to the theory of defense, was a spurious one.

Moreover, so far as the several character witnesses including a rabbi and Catholic priest were concerned, the prosecutor (Tr. Arg. 62) had this to say:

> "There was a man named Robin Hood and he was bent, in his concept of mind, on good, and what did he do? He robbed, and everybody in his band; if he had to go to court, I'll bet he could get as a character witness the same people who were his accomplices."

This comparison was certainly unsupported by the evidence, and the characterization of a group of respectable persons as a gang of outlaws—despite the lame disavowal ("I don't mean that to cast aspersions")—was certainly a foul thrust.

While no objection was taken at the time that there was nothing in the record to warrant these statements, the situation is much like that in *United States* v. *Persico* (C.A. 2), 305 F. 2d 534, where the Court held this conduct reversible error, saying:

> "While no objection was made on the grounds that there was no evidence in the record as to any such relationship, it was tantamount to the prosecutor's testifying."

Of course, if the prosecutor had presumed to testify when that procedure was avoidable, such action whereby he "threw his own weight into the scales against the defen-

dant" would likewise call for judicial condemnation. See *United States* v. *Pepe* (C.A. 2), 247 F. 2d 838, 844.

In a case as close as the one at bar the foregoing unfair assertions and misstatements may well have operated to induce an unjust verdict.

In *Berger* v. *United States*, 295 U.S. 78, this Court held that insinuations in the United States Attorney's closing argument of matters not sustained by the evidence, particularly in a closely litigated case, were so apt to carry weight against a defendant as to necessitate a reversal.

Likewise, in *United States* v. *Spangelet*, 258 F. 2d 338, the Second Circuit held (by Hincks, Circ. J.):

> "It is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials . . ."

In *Wagner* v. *United States*, 263 F. 2d 877, the prosecutor had in his summation advanced an argument not permissible because not warranted by the evidence; in those circumstances it was said that the judgment would be reversed even in the absence of any objection, the Court (Fifth Circuit) citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, where Mr. Justice Douglas wrote:

> "Of course appellate courts in the public interest, may, on their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

These principles have been applied in a number of recent cases wherein convictions have been reversed because of prosecutors' unjustified remarks in summation. Included are the following, all reported in 1963 and 1964: *Washington* v. *United States*, 327 F. 2d 793; *Dugan Drug Stores* v. *United States*, 326 F. 2d 835; *United States* v. *Schwartz*, 325 F. 2d 355; and *United States* v. *Graham*, 325 F. 2d 922.

In the *Graham* case no objection had been interposed to the remarks of the United States Attorney, but this was held to be immaterial, reference being made to *Viereck* v. *United States*, 318 U.S. 236, where this Court directed attention to "conduct of the prosecuting attorney which we think prejudiced petitioner's right to a fair trial, and which independently of the error for which we reverse might well have placed the judgment of conviction in jeopardy" (Mr. Chief Justice Stone). Similarly, in *N.Y. Central R. Co.* v. *Johnson*, 279 U.S. 310, prejudicial remarks in the prosecutor's summation, even without express exception, were deemed ground for reversal.

The prejudicial nature of the prosecutor's statements is highlighted and aggravated by his "unqualified" assertions and information to the jury on a subject concerning which petitioner was barred from presenting much of his proof, namely, as to his religious practices and a rabbi's expert exposition thereof.

Of course, petitioner had no opportunity to refute these matters, even by way of argument, and the Government's recourse to such practices was plainly violative of due process within the fair intendment of the Sixth Amendment.

CONCLUSION

The several foregoing reasons for certiorari herein present questions of importance; they are of a character arising in other trials; and enough uncertainty and differences of opinion exist as to applicable law to render clarification desirable. So far as petitioner is concerned, the cumulative effect of the various challenged rulings was such as to be productive of an unjust result and an unwarranted conviction.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN
Attorney for Petitioner

November 18, 1964

APPENDIX A

Opinion of United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,024

MILTON M. LEVIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 30, 1964

Mr. Frederick Bernays Wiener for appellant.

Mr. Harry T. Alexander, Special Attorney, Department of Justice, with whom *Messrs. David C. Acheson,* United States Attorney, and *Frank Q. Nebeker,* Assistant United States Attorney, were on the brief, for appellee.

Before BAZELON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, Circuit Judge: Appellant was tried, convicted and sentenced for the offense of grand larceny.[1] Count 1 of the indictment on which appellant was tried charged

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[1] D. C. CODE § 22-2201 (1961): "Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

James G. Cross, James Landriscina and others not named as defendants, with conspiracy, in violation of 18 U.S.C. § 371 and § 1503 (1958), to effect a corrupt acquittal of Cross in his trial on a charge of perjury. It further charged that one co-conspirator paid Levin a total of $35,000, the property of the Bakery and Confectionery Workers' International Union of America, which property was entrusted to James G. Cross, its president.

Count 2 of the indictment charged Levin as follows:[2]

> "On or about February 13, 1959, within the District of Columbia, and within the jurisdiction of this Court, defendant Milton M. Levin did unlawfully, feloniously and willfully steal, take and carry away the property of the Bakery and Confectionery Workers' International Union of America, an unincorporated association, entrusted to James G. Cross, President of said union, the said property consisting of $35,000 in money in violation of Title 22, District of Columbia Code, Section 2201."

Count 3 of the indictment charged Cross with having embezzled $35,000 from the Union.

Levin was found guilty of grand larceny as charged in Count 2 of the indictment, and his appeal is now before this court for determination.

The trial was a lengthy one. While the testimony of Landriscina regarding Levin's receipt of the money was specifically denied by Levin, there are corroborating circumstances which bear out the Government's case. In

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[2] Appellant was tried separately and, of course, on Count 2 only.

her charge to the jury, the trial judge set out fairly the contentions of the Government and of the defendant, as follows:

> "Briefly, I shall tell you what the government claims in this case and then I shall tell you what the defendant claims.
>
> "The government contends that Mr. Levin, the defendant, represented to Mr. Cross, President of the Union and to Mr. Landriscina, another Union officer, that he, the defendant, Mr. Levin, could fix the Cross perjury case if he were given $35,000 to use in the fixing; that $35,000 in cash, of the money belonging to the Union, was by direction of Mr. Cross turned over to Mr. Landriscina, that Mr. Landriscina then turned over the $35,000 to the defendant, Mr. Levin, in order that Mr. Levin might use the money to bribe court officials, or a court official and jurors in a case in which Mr. Cross was the defendant and in which he was charged with perjury. And the government further contends that the defendant, Mr. Levin, just pretended that he would bribe people and that when he took the $35,000, it was with the intent of appropriating it to his own use. That, as I said, is what the government contends.
>
> "On the other hand, Mr. Levin denies that he ever had any understanding with anyone to fix the Cross perjury trial and he denies receiving the $35,000 mentioned in the indictment, or any part of it. He concedes that he had conversations with certain Union officials and that he saw them, but he says these conversations were primarily about his employment as a lobbyist or as general counsel for the Union, and that checks he received from the Union were for services rendered."

Appellant concedes that the evidence on behalf of the government, if believed by the jury, as it evidently was, was sufficient to support the charge in the indictment; and unless the questions of law urged by appellant are well taken, the judgment of conviction must be affirmed.

I

Appellant first contends that there was no evidence showing that he committed larceny by trick of the Union's money. Reduced to its pertinent essentials, appellant's contention is that the essence of larceny by trick is a fraudulent inducement of the *true owner* to convey his property to the thief. Thus, inasmuch as the indictment charged appellant only with larceny of money belonging to the Union, the conviction cannot stand since Cross, from whom the money was received, had embezzled the money from the Union and thus was not its true owner.

We think this is a misconception of the nature of the crime of larceny, which is an offense against the possession rather than the ownership of property. As indicated by the statute, the gist of the crime is the felonious taking and carrying away of anything of value and, under the terms of our statute, as distinguished from those of certain other jurisdictions, the ownership of the property does not matter. Even granting that Cross was a thief, or embezzler, it would be no defense that the defendant stole from the thief, for it is well settled that one who steals money or property which itself had been stolen by another may be prosecuted notwithstanding the illegality of his victim's

possession. This principle has been followed in a number of cases wherein it was held or recognized that stolen money or other property may be a proper subject of larceny or a crime involving larceny such as robbery or forgery.[3]

Appellant further contends that the essence of the offense of larceny here involved is a fraudulent inducement, the elements of which are: (1) false representation; (2) with reference to a material fact; (3) acknowledgment of the falsity; (4) intent to deceive; and (5) action taken in reliance upon the representation. In the trial proceedings, the judge so charged the jury. Appellant argues, however, that since the officers with whom he dealt had acted outside the scope of their authority in embezzling or conspiring to embezzle the money from the Union, any representations to them by the appellant, or reliance by them on such representations, were not those of the Union. As a result, since the essential elements of false representation and reliance were not present as against the Union, appellant could not be found guilty of larceny by trick with regard to the Union. In so arguing, however, appellant mistakenly assumes that under the indictment and the statute it would be necessary to show that Cross was authorized to conduct the transaction for the Union. However, the indictment reads that defendant did "take and carry away the property of the . . . Union . . . *entrusted* to James G. Cross." [Empnasis added.] There was no requirement that

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[3] E.g., *State* v. *Pokini*, 367 P. 2d 499 (Hawaii 1961); *State* v. *Bowden*, 61 N.J. Super 339, 162 A. 2d 911 (1960); *Hall* v. *State*, 160 Tex. Crim. 553, 272 S.W. 2d 896 (1954); *State* v. *Wales*, 168 La. 322, 122 So. 52 (1929); *Smith* v. *State*, 187 Ind. 253, 118 N.E. 954 (1918); *Maxwell* v. *Territory*, 10 Ariz. 1, 85 Pac. 116 (1906); *Commonwealth* v. *Rourke*, 64 Mass. (10 Cush.) 397 (1852).

it be shown that the money was received *from* the Union, but rather (1) that the money was that *of* the Union, and (2) that it was the money "entrusted" to Cross.

That the money can be considered to have been "entrusted" to Cross, within the meaning of that phrase in the indictment, is clear. Granted, as it must be, that Cross was a faithless agent, nevertheless, he was at the very least a trustee *ex malificio*. Moreover, with regard to the actual ownership of the money, appellant in his brief states:

> ". . . and of course the money still belonged to the Union notwithstanding the circumstance that Cross had embezzled it from the Union the day before . . . ."

Hence it seems clear to us that there was sufficient evidence by which the jury could find that appellant had committed larceny of the Union's money as charged in the indictment and appellant's argument on this point is without merit.

II

Appellant's second point is that reversible error was committed by the trial court in excluding Rabbi Isaacson's testimony as to appellant's religious habits and as to the requirements of the Jewish Orthodox ritual. A resume of the evidence showing the significance of this point seems indicated.

At the trial, the Government introduced testimony by Landriscina that he gave $10,000 in small bills to appellant

on the morning of February 12, 1959,[4] and the balance ($25,000) of the agreed $35,000 at about 5:00 p.m. on Friday, February 13, 1959. These transfers, it was testified, were made in a park near the Statler Hotel in Washington, D. C. On the other hand, appellant testified that Landriscina did not give him any money in the District of Columbia on either February 12 or February 13, 1959, that he (appellant) checked into a hotel in the District of Columbia at 5:43 p.m. on February 12, 1959,[5] that he was not in the District on the morning of February 12, that he left the District not later than 1:00 p.m. on February 13, and got to his home in Little Neck, Queens, Long Island, New York, somewhere "between four and five o'clock or before then," and that he was home on February 13, 1959, at five o'clock (p.m). In response to the question "How do you fix that you were at home?" he stated:

> "Friday afternoon is the Sabbath, which we observe quite diligently, and I never go away from home and my family on the Sabbath."

Upon inquiry by the trial judge, he stated that he remembered being at home on that Friday, February 13, 1959.

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[4] Other witnesses for the Government through whom Landriscina got the $10,000 in small bills gave testimony indicating that Landriscina did not receive the $10,000 until the morning of Friday, February 13, 1959. The jury thus could infer, if it credited this testimony and that of Landriscina that he paid the $10,000 to the appellant, that Landriscina was mistaken as to the date and that the transfer took place on February 13 instead of February 12.

[5] The hotel records showed that he checked in at 5:43 on February 12, 1959, and checked out at 11:30 a.m. on February 13, 1959. Whether the check-in time was 5:43 a.m. or 5:43 p.m. was not recorded. Appellant stated that it was p.m. because "I just know I wouldn't be checking into a hotel at 5:43 in the morning."

His testimony in this respect was corroborated by his wife who testified that her husband was home on Friday, February 13, 1959, "after four, about twenty after four, four-thirty at the very latest" according to her best recollection.

Appellant testified further that "I would think I took the train" to come to Washington on February 12. He stated that he had no checks for February, 1959, evidencing any payment to a railway company and "when I take the train, if I were to take the train, I would pay by cash." Appellant's cancelled check in the amount of $13.81 dated February 11, 1959, payable to Eastern Airlines, representing the one way fare between New York and Washington at that time was identified. Appellant testified that the check represented a trip "to or from Washington," and that—

> "It is very likely that that was a reservation. If I were coming back on the 13th, which was a Friday, I would make a reservation long enough in advance to insure."

From the above resume, it is apparent that appellant's testimony, corroborated in part by the testimony of his wife, if credited by the jury, would establish that he took a plane from the District of Columbia to New York not later than 1:00 p.m. on Friday, February 13, 1959, and that he was not in the District but was at home at 5:00 p.m. on that date. His testimony, if credited, would also require the conclusion that he was not in Washington on the morning of February 12, 1959, and that although appellant admittedly was in Washington on the morning of February 13, 1959, up until 1:00 p.m., he did not meet with or receive any money from Landriscina on that morning.

Appellant offered and there was received, supplementing this direct evidence, the testimony of seven acquaintances, neighbors, and friends, including Rabbi Irwin Isaacson, appellant's wife, and a Catholic priest, that his reputation for honesty, truthfulness, and integrity was excellent. In addition some of these persons [6] testified generally as to appellant's religious habits, stating variously that appellant was very religious, that the Orthodox Jewish Sabbath commenced at sundown Friday and ended at sundown

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[6] These included a friend and neighbor, living two houses away; a part-time office secretary; and his telephone answering secretary. A friend of 12 years standing was not permitted to testify as to appellant's "habits" as such but was permitted to testify that she had never seen him away from home or riding on Friday evenings; that she had visited him in his home on Friday evenings; that she had tried to telephone him on Friday evenings but didn't get an answer; that she lived by the Temple attended by the appellant in the years 1955 and 1957; that "on many Friday afternoons" in those years appellant parked his car in her driveway never later than 3:45 p.m.; that he would then walk home, would return for Temple, and then after sundown on Saturday would have his car "right there to use to ride home." Appellant's wife not only testified, as already indicated, that her husband was home at "four thirty at the very latest" on Friday, February 13, 1959, but also gave testimony as to her husband's habits wtih respect to the Sabbath. She stated, for example, that "my husband is always with me on Friday nights. . . . He was always with me, the only time [exception] is when I went to give birth with my daughter, I had to go on a Friday night and he took me to the hospital and walked home." Again, "Well, my husband is always home when I light the candles on Friday night. . . ." With respect to the time her husband was home on Friday, February 13, 1959, she said: "Well, it would be before six, it had to before sundown on Friday because he is always home then. . . . I light the candles at a certain time and that would be an hour before." Asked what time she lighted the candles on February 13, 1959, she said:

> "Well, it would be—every year it varies and I have a calendar which tells me what time to light the candles—this year it was about eleven minutes after five and that is seventeen minutes before sunset."

She said also that her husband never worked on Saturday, although at times he did work after the Sabbath ended—at sundown Saturday.

Saturday, that appellant never worked on the Sabbath, that it was his habit faithfully to observe the Sabbath, that he was always home at that time, that he was not available for telephone calls, and that he never drove his car on the Sabbath.

After Rabbi Isaacson had testified that appellant's reputation for truthfulness, honesty and integrity was excellent, the following tender was made by counsel for appellant:

> "I wish to go into the subject matter with this witness concerning Mr. Levin's habit of being home on the Sabbath [7] and using him as an expert to testify when the Sabbath commenced and what Orthodox ritual requires."

This testimony was ruled inadmissible, and appellant contends that this constituted reversible error. We disagree.

According to the weight of authority, evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion.[8] Thus

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[7] Apart from the testimony as to appellant's reputation, the Rabbi had testified only that he had been a Rabbi in the active ministry for 18 years, that he knows the appellant and at one time lived in his neighborhood. The Rabbi notably did not state that he was the Rabbi of the Temple attended by the appellant. Thus, no foundation was laid which suggests that the Rabbi could or would state that appellant was always, without exception, home on the Sabbath or that he was in fact at home at the beginning of the Sabbath on Friday, February 13, 1959.

[8] *Weaver* v. *Scofield*, (Mo. App.) 198, S.W. 2d 240 (1946); *State* v. *Lapan*, 101 Vt. 124, 141 Atl. 686 (1928); *Petro* v. *Hines*, 209 Ill. 236, 132 N.E. 462 (1921); *Noonan* v. *Luther*, 206 N.Y. 105, 99 N.E. 178 (1912); *Zucker* v. *Whitridge*, 205 N.Y. 50, 98 N.E. 209 (1912). See *Thompson* v. *Bowie*, 71 U.S. (4 Wall.) 463 (1866); 20 Am Jur. §332, p. 310.

in personal injury cases, evidence of the habits of care or negligence of the injured party is not admissible in proving his care or negligence at the time of his injury.[9] Moreover, as stated in *State* v. *Lapan*, 141 Atl. 686, 694 (1926):

> "Ordinarily, it cannot be proved that a person did a particular thing on one occasion by showing that he did it at another time or times."

Appellant argues, however, citing 1 Wigmore, Evidence § 92, p. 519 (3d ed. 1940) that evidence of habit is of probative value and thus the intended testimony here should have been received. We agree with appellant that evidence of habit is of *some* probative value, although it is far inferior to direct evidence as to what was done at the time and date in question. Certainly those cases which reject such evidence do not do so on the ground that it is of *no* probative value. Rather, in the words of the court in *Zucker* v. *Whitridge*, 205 N.Y. 50, 98 N.E. 209, 213 (1912):

> "Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it,

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[9] *Thomas* v. *Kimsey*, (Mo. Sup.) 322 S.W. 2d 754 (1959); *Poole* v. *Evergreen Livestock Co.*, 262 Ala. 131, 77 So. 2d 475 (1955); *Lowenthal* v. *Mortimer*, 125 Cal. App. 2d 636, 270 P. 2d 942 (1954); *MacGillivray* v. *First Nat. Stores*, 326 Mass. 678, 96 N.E. 2d 159 (1951); *Harper* v. *Dees*, 214 Ark. 111, 214 S.W. 2d 788 (1948); *Cox* v. *Norris*, 70 Ga. App. 580, 28 S.E. 2d 888 (1944); *Parsonnet* v. *Keil's Newark Bakery*, 119 N.J. L. 301, 196 Atl. 661 (1938); *Blondeau* v. *Sommer*, Tex. Civ. App., 99 S.W. 2d 668 (1936); *Moore* v. *American Stores Co.*, 169 Md. 541, 182 Atl. 436 (1936); *Wyatt* v. *Russell*, 308 Pa. 366, 162 Atl. 256 (1932); *Laufer* v. *Bridgeport Trac. Co.*, 68 Conn. 475, 37 Atl. 379 (1897). See *Perkins* v. *United Transp. Co.*, 219 F. 2d 422 (2d Cir. 1955).

> and decide whether, as a matter of good policy, it should be admitted. Uniform conduct under the same circumstances on many prior occasions may be relevant as tending somewhat to show like conduct under like circumstances on the occasion in question. All relevant evidence, however, is not competent. . . . So, assuming the evidence in question to be relevant, I think it should be held incompetent under the circumstances, because its probative force does not outweigh the inconvenience of a multitude of collateral issues, not suggested by the pleadings, the trial of which would take much time, tend to create confusion and do little good. . . . Habit is an inference from many acts, each of which presents an issue to be tried, and necessarily involves direct, and naturally invites, cross examination. The circumstances surrounding each act present another issue, and thus many collateral issues would be involved which would not only consume much time, but would tend to distract the jury and lead them away from the main issue to be decided. From the want of previous notice, the other party would not be prepared to meet such evidence; and after all the testimony of this character was in the fact would remain that, as no one is always careful, the subject of inquiry, although careful on many occasions, might have been careless on the occasion in question."

Dean Wigmore himself acknowledges the extent to which the probative value of habit evidence may vary:

> "There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence

> of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances." 1 Wigmore, *supra* at 520.

It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of "invariable regularity." Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value. As Chamberlayne has observed:

> "The probative force of habit, whether the question arises in a civil or criminal case, is based principally upon the fact that habitual conduct is largely free from the complicating and confusing element of volition which makes the relevancy of moral conduct merely deliberative, but, on the contrary, brings such conduct in line with the activities of the body which are under the control of the subliminal mind, i.e., are of the automatic nature, practically under the uniformity of natural law. In fact, the probative strength of habit is in proportion to the extent to which it assumes this automatic character."

Chamberlayne, Modern Law of Evidence § 3204, p. 4433. Needless to say, the observance of the Sabbath in a particular manner involves a volitional assent, however guided or instructively urged.

Appellant argues that *Howard* v. *Capital Transit Co.*, 97 F. Supp. 578 (D.D.C. 1951) is authority in this jurisdiction for the admissibility of the testimony offered. In that case, a wrongful death action, the District Court admitted circumstantial evidence of the decedent's possession of a weekly pass for the defendant transit company's bus service. The court found that such evidence had probative value respecting the issue of whether the decedent was a passenger on the bus at the time of the occurrence. In the court's words:

> "In view of the fact that decedent's lips were sealed and there were no witnesses who could positively identify him as having been a passenger, this evidence was logically relevant and material, and I am aware of no exclusionary rule requiring its rejection."

97 F. Supp. at 579. It is apparent that the absence of decedent's testimony and the lack of eyewitnesses were the critical factors considered by the court in admitting the evidence. There appears indeed to have been no evidence in that case of the decedent's "habit" as such to ride the buses of the defendant company on the route and at the time in question. The court stated merely:

> "Assuming, arguendo, that this and other evidence had the effect of showing the habit or custom of deceased in using defendant's buses to return home from his place of employment, there is convincing authority for its admissibility for such purposes." *Ibid.*

Consequently the case is readily distinguishable from this one as coming within the exception to the rule in personal

injury suits, supported by the overwhelming weight of authority, that evidence of habit or custom is not admissible where there are eyewitnesses to the accident.[10]

This case is one requiring the jury to choose between the testimony of Landriscina and of the appellant, both alleged participants in the contested payment of money, and thus in a sense both "eyewitnesses." Certainly neither the fact that Landriscina was a prosecution witness nor the fact that both his and Levin's veracity was under attack would be sufficient to require, as a matter of law, the admission of further cumulative evidence[11] of the appellant's habit of being at home before sundown on Fridays.[12] As already indicated appellant's wife not only testified as to his presence at home after 4:30 p.m. on the Friday in question, but she, as well as others (see note 6 *supra*), gave habit testimony. And, as indicated, the tender with respect to the Rabbi was not accompanied by a sufficient showing for admission of his testimony as to appellant's habits.

Even on the assumption that the Rabbi might have become appellants' "weightiest witness," as his brief charac-

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[10] *Whittenmore* v. *Lockheed Aircraft Corp.*, 65 Cal. App. 2d 737, 151 P. 2d 670 (1944); *Jackson* v. *Chesapeake & O. Ry. Co.*, 179 Va. 642, 20 S.E. 2d 489 (1962); *Holcomb* v. *W. N. Watson Supply Co.*, 171 S.C. 110, 171 S.E. 604 (1933); *Petro* v. *Hines*, 299 Ill. 236, 132 N.E. 462 (1921). *Cf.* Annot., 15 A.L.R. 125; Annot., 18 A.L.R. 1106; 9c BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE 290, *et seq.*; 4 CHAMBERLAYNE, MODERN LAW OF EVIDENCE §§ 3195-98; 2 JONES COMMENTARIES ON EVIDENCE §§ 687-89.

[11] Appellant acknowledges on brief that there was evidence in the record showing his fixed habit as an Orthodox Jew to be at home with his family by sundown every Friday for the Sabbath observance.

[12] *Gillette Motor Transport, Inc.* v. *Kirby*, 208 Okla. 68, 253 P. 2d 139 (1953); *Petro* v. *Hines*, 299 Ill. 236, 132 N. E. 462 (1921). See also note 13, and cases there cited.

terizes the Rabbi, we do not think it was reversible error to exclude further cumulative evidence as to appellant's Sabbath habits in the circumstances here.[13] The prosecution did not dispute his general habit to be home on Friday evenings, but only his whereabouts on a particular Friday evening. It is not unimportant in this connection that, under the evidence adduced by the prosecution, $10,000 of the amount said to be involved was allegedly paid to the appellant on the morning of Thursday, February 12, or the morning of Friday, February 13. Further habit evidence as to Friday evenings would not have pertained to those times.

Nor do we think it was an abuse of discretion on the part of the District Court not to receive the Rabbi's expert testimony as to "when the Sabbath commenced and what Orthodox ritual requires." Witnesses had already testified as to when the Sabbath commenced and when it ended. There was

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[13] It is well settled that the receipt of further cumulative evidence in a criminal trial lies within the sound discretion of the trial judge. See our decision in *Burgman* v. *United States*, 88 U.S. App. D.C. 184, 188-89, 188 F. 2d 637, 641-42, *cert. denied*, 342 U.S. 838 (1951); *Suhay* v. *United States*, 95 F. 2d 890 (10th Cir. 1938), *cert. denied*, 304 U.S. 580 (1938); *Chapa* v. *United States*, 261 Fed. 775 (5th Cir. 1919), *cert. denied*, 252 U.S. 583 (1920). And see as to character evidence *United States* v. *Baysek*, 212 F. 2d 446, 447 (3d Cir.), *cert. denied*, 348 U.S. 836 (1954); *Shaw* v. *United States*, 41 F. 2d 26, 27-28 (5th Cir. 1930); *Brady* v. *United States*, 41 F. 2d 449, 451 (7th Cir. 1930); *Hauge* v. *United States*, 276 Fed. 111 (9th Cir. 1921). The District Court's original theory in this case was that an alibi could not successfully be established by evidence of habit, but as indicated, the only habit testimony actually excluded was that of the Rabbi. We cannot hold this reversible error. In addition to what is said above, we note on the question of "weightiness" that the order in which appellant's witnesses were called was the choice of himself (a lawyer) and his retained counsel, and that the reservation of the Rabbi until the last to give evidence as to a habit already testified to must have been a deliberate choice made with knowledge of the possible consequences.

abundant evidence as to appellant's devotion and reverence and his habit of being at home with his family at the beginning of the Sabbath. His whereabouts at that time on a particular date, February 13, 1959, is one of the facts in issue in this case, but the requirements of Orthodox ritual generally, apart from that particular requirement, have no present relevance.

It is urged also that the prosecution's witness Landriscina was contradicted in some respects by prosecution exhibits and other prosecution witnesses, and the case was thus a close one. The effect of the contradictions of Landriscina's testimony by other evidence was solely for the jury to weigh, under credibility instructions which we believe adequate and which are not challenged here. The closeness of the case was also a matter to be resolved by the jury, particularly where as here the credibility of both alleged participants as witnesses was in issue. We note that the jury returned with its verdict in 1¾ hours.

III

Appellant next contends that the court incorrectly instructed the jury regarding the weight it could attach to such testimony relating to appellant's religious habits as was admitted. Appellant's trial counsel requested that the jury be instructed as follows:

> "There has been evidence of the fixed habit of the defendant, Milton M. Levin, concerning his presence at his home on Friday evenings for the observance of his Sabbath. You may consider this evidence as proof of his contention that he was at his home in New York

> on Friday, February 13, 1959, at approximtaely 5:00 o'clock p.m."

Appellant's counsel concedes before us, as indeed he must, that this requested instruction was improper and was correctly denied. He contends, however, that the instruction actually given was erroneous and that it was objected to before the jury retired.

The trial judge advised counsel that she would instruct the jury on the question of the weight to be given to the evidence referred to, and did in fact instruct the jury as follows:

> "It is my recollection that Mr. Levin testified, as did other witnesses, that he has a habit or practice of a religious nature whereby he stays at home from sundown Fridays to sundown Saturdays. You are told that proof of such a habit or practice is not proof that the defendant is never elsewhere at that particular time."

After the court had concluded its charge, counsel were asked if there were any objections or requests and were told that if there were, counsel should come to the bench. At this time, counsel for appellant stated:

> "I object to Your Honor's instructions as given concerning custom and habit.
>
> "And I re-offer Instructions Nos. 12 and 13 . . . 13 was my instruction to the converse of custom and habit."

The trial judge responded regarding the offered Instruction 12, counsel thanked the court, and nothing further was

said by counsel regarding the refused Instruction (13) on custom and habit, set out above and now conceded to be erroneous. No request was made that the charge as given be changed, corrected, or clarified in any manner.

We do not regard the charge as erroneous in the circumstances here and in any event it does not seem unduly prejudicial. Proof of habit, for religious reasons, to be at home on Friday evenings clearly is not conclusive proof that the person having the habit may not be elsewhere on occasion and particularly on the specific Friday evening in issue. Here, of course, as already pointed out, there was direct testimony by appellant and his wife that he actually was at home at sundown on the precise Friday involved, as the District Court clearly brought to the attention of the jury.

The instruction must of course be considered in context with the Disrict Court's instructions to the jury as a whole. When so considered, the habit instruction appears to us not to have any prejudicial effect. The habit instruction was immediately followed by the following:

> "You are further told that Mr. Levin has interposed in this case a defense known as an alibi. There has been testimony to the effect that the defendant was not present at the time and place when the offense with which he is charged was allegedly committed. It is my recollection that Mr. Levin testified to that effect and that Mrs. Levin did, also. However, you are to be guided by your own recollection of their testimony. You are told that the defense of alibi is a legitimate, legal and proper defense. The evidence adduced in support of this defense, however, like all other evidence in the case, should be given such weight and such consideration by the jury as the jury

> may think it is entitled to receive under all the facts and circumstances of the case.
>
> "If after a full and fair consideration of all the facts and circumstances in evidence, the jury finds that the government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offense charged in the indictment, then one of the essential elements of the offense would be lacking and, in that event, it would be your duty to find the defendant not guilty."

Other instructions which have importance with respect to the overall effect of the habit instruction as set out below.[14]

In Rule 30, FED. R. CRIM. P., it is provided, in part:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis supplied.)

FED. R. CRIM P. 51 provides that, while exceptions to rulings or orders of the court are unnecessary, it is suf-

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[14] The court also instructed the jury that they were the sole judge of the credibility of each witness and gave full instructions regarding all the factors to be considered in determining credibility. It referred to the problem of contradiction in testimony. It instructed that the jury was to treat as evidence "those *inferences* which to your mind logically and reasonably arise from the evidence." [Emphasis supplied.] It told the jury that they must have no reasonable doubt concerning the defendant's guilt, and explained the term in detail, including the need to weigh the evidence of the defendant's good reputation. It instructed the jury as to the elements of the offense, including the statement, later repeated in substance as set out above, that the jury must find beyond a reasonable doubt that "all this occurred in the District of Columbia on or about February 13, 1959."

ficient that a party, at the time of the ruling or order, make known to the court the action he desires the court to take or his objection to the action of the court *and the grounds therefor*. This was not done in the present case. Appellant's trial counsel was insistent on his own instruction, and did not state "grounds for his objection" to the court's charge. Nor do we see any reason for exercising our discretion under FED. R. CRIM. P. 52(b).

IV

Finally, it is urged that it was reversible error to exclude the testimony of Landriscina before the Grand Jury since it was claimed that evidence contradicted, in significant particulars, his testimony at the trial.

What happened, as disclosed by the record, was that appellant requested access to the transcript of the Grand Jury testimony, or an *in camera* inspection. He stated to the court the matters in which he was interested and, acceding to his request, the court conducted an *in camera* inspection and concluded that there were no inconsistencies so far as she could see. However, the court stated that although she could see no inconsistencies, defense counsel "might see some inconsistency that I did not see," since "he has been living with this case a long time. I have not." Accordingly she read aloud, in the presence of counsel for both sides, the questions and answers of Landriscina's Grand Jury testimony respecting the issues in which appellant stated he was interested. He now complains that he should have been given the questions and answers to read. The fact is

that after hearing the questions and answers read by the court, he said "Thank you very much, Your Honor" and did not ask the court for further relief. He apparently was satisfied with the manner in which the hearing before the Grand Jury was presented to him. Under these circumstances, we can find not error affecting substantial rights.

We believe the appellant had a fair trial and no error appearing, the judgment of conviction is affirmed.

Affirmed.

BAZELON, *Chief Judge*, dissenting: Levin's conviction of grand larceny was substantially based on testimony of James Landriscina that he met Levin in Washington, D.C., at 5:00 p.m., Friday, February 13, 1959, and gave him $25,000.[1] Levin testified that he was in Washington that day but that he left in the early afternoon. Levin attempted to support his alibi by establishing his religious habit of always being home with his family in New York on the Jewish Sabbath—sundown Friday through sundown Saturday.

The majority here accepts the rule generally followed by courts and commentators that habit evidence, if specific enough, may be admitted. Such evidence is logically probative and no rule excludes it. Whether its probative value is worth the excursion into collateral issues that proof of the habit may require depends on the particular facts of a

[1] Landriscina also testified he gave Levin $10,000 on Thursday morning, February 12. But other union officials testified Landriscina did not receive the $10,000 until Friday morning. See note 4 *infra*, and majority opinion, note 4 *supra*.

case. Such questions are generally confided to the trial court's discretion. In this case, the trial court apparently had in mind neither the probative value of habit evidence nor the inconvenience of an excursion into collateral issues. It took the view that evidence of habit may not be used to prove alibi in a criminal case. This view has no support in reason or authority and its application here was highly prejudicial.

I think that in the circumstances of this case—where the central issue concerned an event four years before the trial and the testimony of the sole alleged eyewitness was open to suspicion [2]—the defendant was clearly entitled to support his alibi with evidence of his religious habit. The question remains whether he was effectively denied the opportunity to do so, either because his introduction of such evidence was too sharply curtailed or because the trial court's rulings and charge dissipated the value of the habit evidence he did introduce.

Exclusion of the rabbi's testimony of habit was probably not prejudicial in view of the similar testimony presented by other witnesses. But I think the value of their testimony was vitiated by the court's erroneous rulings and charge. Because the question of guilt was close, I think these errors require reversal of the conviction.

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[2] At least where the proffered habit evidence tends to show that an event never took place, I see no reason to exclude the habit evidence simply because there is a purported eyewitness to the event. McCORMICK, EVIDENCE 342 n. 9 (1954); MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 390 (1957). That direct evidence is more weighty than habit evidence is adequately conveyed by an instruction; it does not call for exclusion of the "inferior" evidence.

The court told counsel that habit evidence was irrelevant. See TR 627-34. It also told counsel it would instruct the jury that evidence of the defendant's habit of doing something is no proof that he did so on a particular occasion, TR 634, and that all matters with respect to habit and custom were to be excluded and stricken. TR 633, 925. On one occasion the court cut off questioning when defense counsel began inquiring into appellant's habit, saying in the presence of the jury:

> Mr. Stein, we are not concerned here with what Mr. Levin has done all the rest of his life. [TR 627]

All this may well have discouraged defense counsel from attempting fully to explore the matter with any witness, and may well have led the jury to believe it could not consider appellant's habit in determining whether he had or had not met Landriscina and received the money at 5:00 on a Friday afternoon.

If there was any question about this in the jurors' minds, it must have been resolved by the court's charge. The court told the jury:

> It is my recollection that Mr. Levin testified, as did other witnesses, that he has a habit or practice of a religious nature whereby he stays at home from sundown Fridays to sundown Saturdays. You are told that proof of such a habit or practice is not proof that the defendant is never elsewhere at that particular time.

The majority, in finding that this charge was not erroneous in the circumstances here, says:

> Proof of habit, for religious reasons, to be at home on Friday evenings clearly is not *conclusive* proof that the person having the habit may not be elsewhere on occasion and particularly on the specific Friday evening in issue. [Emphasis supplied.]

Such a charge would have been correct. But the charge given did not use the word "conclusive"; it said proof of the habit is "not proof". In light of all that had gone before, and especially the court's statement of how it expected to charge the jury, I cannot assume the omission of the word "conclusive" was unlikely to mislead the jury.[3] Rather, it fits the pattern, consistently maintained throughout the trial, of not allowing the jury to consider habit evidence in relation to Levin's alibi.

The trial lasted eight days; the transcript is 1076 pages long. Despite the effort and expense involved in a new trial, I think one is required. In determining whether error was prejudicial, the closeness of the case is a crucial consideration. *Edwards* v. *United States*, 265 F. 2d 302 (9th Cir. 1959). Here the only witness directly implicating appellant was Landriscina, who claimed to be the other party to the transaction. Landriscina had already pleaded guilty to conspiracy to obstruct justice under another count of the indictment involved here. His testimony was thus subject to impeachment and was in fact impeached. His testimony as to dates and times was contradicted by other prosecution witnesses.

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[3] That defense counsel's requested instruction was erroneous means that denying it without more would not have been error. The error here was not refusing to give the requested instruction; it was giving the prejudicial instruction.

A jury in this jurisdiction is permitted to believe the uncorroborated testimony of an accomplice, or testimony corroborated circumstantially by other accomplices;[4] and the Government may establish a prima facie case with testimony that is contradictory in several material respects. But I think we cannot hold, as a matter of law, that evidence tending to exculpate the defendant would have been unlikely to influence the jury's decision if the jury had been allowed to consider it. I would grant a new trial.

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[4] Several union officials testified that a check for $35,000 was cashed on Friday, June 13. But only Vincent Belloni, who the court charged might be an accomplice, gave testimony tending to connect Levin with the money. Belloni testified that in January 1959 he and Landriscina visited Levin's New York office where they discussed Cross' legal representation at his pending perjury trial. Nothing was said about fixing the case. Belloni had a subsequent conversation with Levin at the latter's New York office:

> "I told him that Jimmy had called me and had told me that Mr. Levin wanted $35,000 for the case, and Jimmy had told me to speak to Mr. Levin to see if he could bring the price down and where the money was going.
>
> * * *
>
> "Mr. Levin says no, that would be the price and what's the difference where the money would go.
>
> "Q. Did he say anything more?
>
> "A. What's the difference where the money would go as long as the job is done."

Belloni did not think there was anything wrong or irregular about the questions he propounded to Levin at Landriscina's request. A few days after Cross' perjury trial had terminated, Levin called Belloni on the telephone and told him "when I say something will be done it is usually done." In several conversations with Belloni, Levin never said whether or not he received the $35,000.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,024 September Term, 1963.

Criminal 913-62

MILTON M. LEVIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM the United States District Court for the District of Columbia.

Before:

BAZELON, Chief Judge, and
WASHINGTON and BASTIAN, Circuit Judges

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian

Dated: June 30, 1964.

Separate dissenting opinion by Chief Judge Bazelon.

APPENDIX C

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,024 September Term, 1964

Crim. No. 913-62

MILTON M. LEVIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before:

BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT and MCGOWAN, Circuit Judges, in Chambers

ORDER

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the court the court *en banc* that the petition is denied.

Per Curiam.

Dated: Sep 22 1964

Chief Judge Bazelon and Circuit Judges Fahy and Wright would grant the petition.

APPENDIX D

Indictment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn in on May 2, 1961
Criminal No. 913-62

THE UNITED STATES OF AMERICA

v.

JAMES G. CROSS, MILTON M. LEVIN, JAMES LANDRISCINA

Grand Jury Original

Violations: 18 U.S.C. 371, 1503; 22 D.C.C. §§ 1202, 2201.

The Grand Jury Charges:

1. Commencing on or about January 1, 1959, and continuously thereafter until February 17, 1959, within the District of Columbia, and within the jurisdiction of this Court, and at other places unknown to the Grand Jury, James G. Cross and James Landriscina, defendants herein, and Vincent Belloni and Peter H. Olson, named herein as co-conspirators but not as defendants, divers other persons unknown to the Grand Jury, unlawfully, feloniously, willfully and knowingly, did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, that is, to violate Section 1503, Title 18, United States Code.

2. It was a part of said conspiracy that defendants and co-conspirators unlawfully, willfully and knowingly would corruptly influence, obstruct, and impede, and would corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States Judicial District for the District of Columbia.

3. Said administration of justice included, among others, the following proceedings and matters:

A. On or about October 6, 1958, a perjury indictment, Criminal No. 908-58, was duly filed in the United States District Court for the District of Columbia, which indictment charged James G. Cross, a defendant herein, with unlawfully, willfully and knowingly, and contrary to an oath that he would testify truly before the "Select Committee on Improper Activities in the Labor or Management Field" of the United States Senate, did testify contrary to said oath by stating a material matter which he did not believe to be true, in violation of Title 18, United States Code, Section 1621.

B. On or about October 20, 1958, defendant James G. Cross entered a plea of not guilty in Criminal No. 908-58, and was released on bond.

C. Trial of defendant James G. Cross upon the aforesaid perjury indictment, Criminal No. 908-58, began on February 16, 1959, and terminated on February 17, 1959, in the United States District Court for the District of Columbia.

4. Among the means by which the defendants and co-conspirators would carry out the aforesaid conspiracy were the following:

A. Co-conspirator Vincent Belloni in New York, New York, would and did introduce defendant James Landriscina to one Milton M. Levin.

B. That said Milton M. Levin would and did agree to accept and use $35,000 to pay undisclosed persons to corruptly effect an acquittal of James G. Cross irrespective of the guilt or innocence of the defendant Cross in Criminal No. 908-58.

C. Defendant James G. Cross in the District of Columbia would and did procure $35,000 from the Bakery and Confectionery Workers' International Union of America in a fraudulent and surreptitious manner, said $35,000 to be used to corruptly insure the acquittal of defendant James G. Cross in the aforesaid perjury trial, Criminal No. 908-58.

D. Defendant James Landriscina in the District of Columbia, would and did obtain $35,000 from co-conspirator Peter H. Olson, as previously directed by defendant James G. Cross.

E. Defendant James Landriscina in the District of Columbia, would and did deliver to the said Milton M. Levin a total sum of $35,000.

Overt Acts

At the time and places hereinafter mentioned, the said defendants and co-conspirators committed, among others,

the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. In or about the month of January 1959, in New York, New York, defendant James Landriscina met with co-conspirator Vincent Belloni.

2. In or about the Month of January 1959, in New York, New York, defendant James Landriscina and the said Milton M. Levin met with co-conspirator Vincent Belloni.

3. In or about the month of January 1959, in Washington, D.C., defendants James Landriscina and James G. Cross met with the said Milton M. Levin.

4. In or about the month of January 1959, in New York, New York, defendant James Landriscina conferred with co-conspirator Vincent Belloni in New York, New York.

5. In or about the month of January 1959, defendant Milton M. Levin met with co-conspirator Vincent Belloni in New York, New York.

6. On or about February 12, 1959, in Washington, D.C. defendants James G. Cross and James Landriscina met with co-conspirator Olson in Washington, D.C.

7. On or about February 12, 1959, in Washington, D.C., defendant James G. Cross, feloniously and fraudulently authorized and caused to be authorized a $35,000 check to be drawn on the bank account of the aforesaid Bakery Union.

8. On or about February 13, 1959, defendant James Landriscina met with co-conspirator Peter B. Olson in Washington, D.C.

9. On or about February 13, 1959, within the District of Columbia, defendant James Landriscina gave the said Milton M. Levin a total of $35,000, all in violation of Section 371, Title 18, U.S.C.

SECOND COUNT

On or about February 13, 1959, within the District of Columbia, and within the jurisdiction of this Court, defendant Milton M. Levin did unlawfully, feloniously and willfully steal, take and carry away the property of the Bakery and Confectionery Workers' International Union of America, an unincorporated association, entrusted to James G. Cross, President of said union, the said property consisting of $35,000 in money in violation of Title 22, District of Columbia Code, Section 2201.

THIRD COUNT

On or about February 12, 1959, within the District of Columbia, and within the jurisdiction of this Court, James G. Cross, then and there being an officer of the Bakery and Confectionery Workers' International Union of America, an unincorporated association, to wit President, wrongfully converted to his own use and fraudulently took and secreted with intent to convert to his own use $35,000 in money, the property of the said union, which money and property had come into his possession and under his care by virtue of his employment and office as President of the aforesaid union, in violation of Title 22, District of Columbia Code, Section 1202.

APPENDIX E

D. C. Code Section 22-2201

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

APPENDIX F

Constitutional Provisions

First Amendement:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment, of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."